

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Forfeiture Methodology for Violations of)	EB Docket No. 16-330
Rules Governing Payment to Certain)	
Federal Programs)	

REPLY COMMENTS

CTIA[®], NCTA – The Internet & Television Association, United States Telecom Association, and INCOMPAS (collectively, the “Associations”)¹ hereby submit these reply comments in support of the Petition for Reconsideration² of the above-captioned *Treble Damages Policy Statement*.³ The record before the Commission confirms that the Commission’s *Treble Damages Policy Statement* is unlawful both on process and substance and must be vacated.

The Petition demonstrated conclusively that the *Treble Damages Policy Statement* is a substantive rule that must be promulgated through public notice and comment procedures under the Administrative Procedure Act (“APA”), 5 U.S.C. § 553(b). Because the Commission did not follow these procedures, the *Treble Damages Policy Statement* must be vacated,⁴ just as the D.C.

¹ The Associations are trade associations whose members include telecommunications service providers obligated to pay assessments for the federal Universal Service Fund, Telecommunications Relay Service Fund, local number portability, North American Numbering Plan, and regulatory fee programs, and to file data required to assess payment obligations for these programs.

² Petition for Reconsideration, EB Docket No. 16-330 (Mar. 6, 2015) (the “Petition”); Federal Communications Commission, Petition for Reconsideration of a Policy Statement, 81 Fed. Reg. 74431 (Oct. 26, 2016).

³ *Forfeiture Methodology for Violations of Rules Governing Payment to Certain Federal Programs*, 30 FCC Rcd 1622 (2015) (“*Treble Damages Policy Statement*”).

⁴ Petition at 2-7.

Circuit set aside the Commission’s original 1991 forfeiture policy statement.⁵ Further, as a matter of substance, the Commission’s proposed treble damages methodology is an arbitrary and capricious effort by the Commission simply to drive forfeiture amounts for payment and reporting violations in connection with certain federal regulatory programs as high as possible.⁶ The *Treble Damages Policy Statement* also incorrectly asserts that such payment and reporting violations are continuing violations for purposes of the one-year statute of limitations.⁷

There are no comments challenging these conclusions. To the contrary, the only commenter in this proceeding, ITTA, confirms that the *Treble Damages Policy Statement* must be set aside.⁸ ITTA provides additional argument and citation bolstering the fundamental conclusion that the Commission’s implementation of a treble damages methodology for calculating forfeitures is a substantive rule subject to APA notice and comment procedures.⁹ In the absence of such procedures, the *Treble Damages Policy Statement* must be set aside.

ITTA also provided additional support for the Associations’ challenge to the Commission’s assertion that “each single failure to pay a federal program assessment constitutes a separate violation that continues until the assessment is fully paid.”¹⁰ As the Associations demonstrated and ITTA confirms, this analysis effectively nullifies the one-year statute of limitations provided in 47 U.S.C. § 503(b)(6) by treating one-time events such as a failure to file data or to make a payment by a date certain as a continuing violation. Under this interpretation

⁵ See *United States Telephone Ass’n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

⁶ Petition at 7-12.

⁷ *Id.* at 12-15.

⁸ See Comments of ITTA – The Voice of Mid-Size Communications Companies, EB Docket No. 16-330 (filed. Nov. 9, 2016) (“ITTA Comments”).

⁹ ITTA Comments at 3-4.

¹⁰ *Treble Damages Policy Statement* ¶ 7 (citation omitted); ITTA Comments at 4.

“[t]here is truly no end to such madness.”¹¹ As Commissioner Pai has stated “[t]his legal theory cannot be right. . . . [I]t ‘stretches the concept of a continuing violation past the breaking point.’”¹² Indeed, under the Commission’s theory, “the statute of limitations for theft would begin to run not when an item is stolen or even when it is discovered that an item has been stolen, but rather when that item is returned to its rightful owner.”¹³

It goes without saying that this cannot be the law. “The mere failure to right a wrong and make plaintiff whole cannot be a continuing wrong which tolls the statute of limitations, for that is the purpose of any lawsuit and the exception would obliterate the rule.”¹⁴ As the D.C. Circuit has put it: “In a country where not even treason can be prosecuted, after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture.”¹⁵

¹¹ *AKM LLC v. Sec’y of Labor*, 675 F.3d 752, 759 (D.C. Cir. 2012).

¹² ITTA Comments at 4 (quoting *Network Services Solutions, LLC*, Scott Madison, 2016 FCC LEXIS 3697 *175 (Statement of Commissioner Ajit Pai, Approving in Part and Dissenting in Part)).

¹³ *BellSouth Telecomms., LLC*, 31 FCC Rcd 8501, 8528 (2016) (Dissenting Statement of Commissioner Ajit Pai); see also *Intelsat License*, 28 FCC Rcd 17183, 17194 (2013) (same) (Dissenting Statement of Commissioner Ajit Pai).

¹⁴ *Fitzgerald v. Seamans*, 553 F.2d 220, 230 (D.C. Cir. 1977).

¹⁵ *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 2 L.Ed. 297 (1804) (Marshall, C.J.)).

For the reasons set forth above and in the Petition, the Commission should set aside the *Treble Damages Policy Statement*.

Respectfully submitted,

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